70 FR 3677, January 26, 2005

A-201-822
ARP: 07/01/2002-06/30/2003
Public Document
IA/ AS, MBB

MEMORANDUM TO: Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

FROM: Barbara E. Tillman
Acting Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the 2002-2003 Administrative Review of Stainless Steel Sheet and Strip in Coils from Mexico; Final Results of Antidumping Duty Administrative Review

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2002-2003 administrative review of the antidumping duty order on stainless steel sheet and strip in coils (S4) from Mexico (A-201-822). As a result of our analysis, we have made changes to the margin calculation as discussed below. We recommend that you approve the positions that we have developed in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues in this administrative review on which we received comments and rebuttal comments from parties:

Adjustments to Normal Value
- Comment 1: Home Market Post-Sale Price Adjustments
- Comment 2: Level of Trade
- Comment 3: Handling Expenses
- Comment 4: Peso-Based Interest Rate for Home Market Sales

Adjustments to United States Price
- Comment 5: CEP Profit
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Cost of Production
- Comment 8: Monthly-Averaging Costs of Raw Material Inputs
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Margin Calculations
- Comment 15: Repurchase of ThyssenKrupp AG Shares
- Comment 16: Treatment of Non-Dumped Sales
- Comment 17: Circumstances of Sale Adjustment

Background

On August 6, 2004, we published in the Federal Register the preliminary results of the administrative review of S4 from Mexico for the period July 1, 2002, through June 30, 2003. See Stainless Steel Sheet and Strip in Coils from Mexico; Preliminary Results of Antidumping Duty Administrative Review, 68 FR 47905 (August 6, 2004) (Preliminary Results).

This review covers one manufacturer/exporter of S4, ThyssenKrupp Mexinox S.A. de C.V. (Mexinox). We invited parties to comment on our preliminary results of review. We received case briefs from the respondent, Mexinox, and Allegheny Ludlum, AK Steel Corporation (formerly Armco, Inc.), J&L Specialty Steel, Inc., North American Stainless, Butler-Armco Independent Union, Zanesville Armco Independent Organization, Inc. and the United Steelworkers of America, AFL-CIO/CLC (collectively, petitioners) on September 7, 2004. We received rebuttal briefs from Mexinox and petitioners on September 14, 2004.

Discussion of the Issues

**Adjustments to Normal Value**

***Comment 1: Home Market Post-Sale Price Adjustments***

Petitioners state that Mexinox originally reported not having granted rebates on home market sales during the period of review (POR). See petitioner case brief at 16. Petitioners state, however, that certain reported billing adjustments to home market customers were, in fact, post-sale discounts which should be rejected because, petitioners allege, they were granted specifically to skew Mexinox's margin calculation.[1]

Petitioners maintain that post-sale payments, including these billing adjustments, must not automatically be accepted by the Department of Commerce (the Department), unless those rebates arise in the normal course of business. Petitioners refer to the Antidumping Manual which states a historical pattern of rebates must be established for the adjustment to be permitted. See petitioner case brief at 17. Petitioners suggest the Department must apply these standards to all home market billing adjustments claimed by Mexinox by rejecting these post-sale price adjustments. Petitioners request the Department set the variable BILLADJ1H to zero for all sales in the home market sales listing.

In addition, petitioners argue that billing adjustments paid to a particular customer, the details of which are also business proprietary, should similarly be disregarded. Petitioners argue such payments to this customer may not even relate to sales of the foreign like product. See Final Analysis Memorandum for additional details.

Respondent counters that the Department correctly accepted the rebates and billing adjustments as reported by Mexinox. Mexinox argues there is no basis for disregarding these billing adjustments, and claims the Department has regularly accepted billing adjustments

[1] Petitioners address two separate types of post-sale billing adjustments. The exact nature of these adjustments is business proprietary information. For a further discussion of these adjustments, see Final Analysis Memorandum dated January 14, 2005.

offered to customers after the sale, even when the adjustment more closely resembled a rebate, because the price adjustments were offered as part of the respondent's standard business practice. Mexinox refers to Carbon and Certain Alloy Steel Wire Rod from Mexico, 67 FR 55800 and accompanying Issues and Decision Memorandum (August 30, 2002) (Wire Rod from Mexico) at Comment 2. Petitioners in that case similarly argued that the Department should disallow post-sale discounts which were not based on pre-existing agreements. Respondent notes the Department disagreed stating, "{i}t is the Department's practice to consider discounts granted after the delivery of the merchandise to the customer to be rebates. However, we disagree with the petitioners' argument that these rebates should be disallowed because they are not based on pre-existing agreements." See Wire Rod from Mexico (August 30, 2002).

Mexinox maintains the Department's Antidumping Manual states that post-sale adjustments are permissible where they constitute standard business practice. Mexinox states it explained in its supplemental questionnaire response that billing adjustments were offered as part of its standard business practice and that the record contains documents supporting the nature and purpose of the discounts. See Mexinox rebuttal brief at 32. Mexinox asserts these price adjustments were properly used by the Department in order to ensure that the price used by the Department reflects the price actually paid by Mexinox's customers. Mexinox states the Court of International Trade determined the Department should accept billing adjustments that accurately reflect the price paid by respondent's customers. See Luoyang Bearing Corp. v. United States, Slip Op. 04-53 (CIT 2004). Mexinox argues these discounts were offered as part of its standard and legitimate business practice and accurately reflect the revenue Mexinox realized on these sales. Mexinox argues that the Department should accept these billing adjustments as reported by Mexinox.

Finally, with respect to adjustments granted to a specific customer, Mexinox maintains that it provided substantial documentation to the Department of this particular customer in Attachments B-30 and B-31-B to its Sections A-C Supplemental Questionnaire Response (March 30, 2004). Mexinox contends it included examples of payments and translated copies of the agreements pertaining to these transactions. Mexinox avers its arrangement with this specific customer has been in place for many years, and the Department had verified the nature of these discounts during the 2001-2002 review. See Mexinox rebuttal brief at 34. Respondent argues that in this current review the Department selected and tested a number of transactions for which Mexinox reported lump-sum billing adjustments in field BILLADJ2H to this customer. Mexinox states it provided complete supporting documentation that every one of the products invoiced was subject merchandise (as indicated by internal product codes) and that the lump-sum payment, (as evidenced by a credit note) was made pursuant to the agreement with this particular customer. See Mexinox rebuttal brief at 35. Mexinox concludes that the documentation it provided confirms these adjustments pertained to sales of subject merchandise.

*Department's Position*: The Department accepts billing adjustments made on behalf of the respondent. As stated in the 2001-2002 review, the Department's regulations require that in determining normal value, export price (EP), or constructed export price (CEP) we calculate a price that is net of any price adjustments reasonably attributable to the foreign like product or subject merchandise. See Stainless Steel Sheet and Strip in Coils from Mexico: Final Results of Antidumping Duty Administrative Review, 69 FR 6259 (February 10, 2004) and accompanying Issues and Decision Memorandum at 27 (POR3 Final Results). See also 19 CFR section 351.401(c). Department regulations further define price adjustments as any change in the price charged for subject merchandise or the foreign like product, such as

discounts, rebates and post-sale price adjustments, which are reflected in the purchaser's net outlay. See 19 CFR section 351.102(b).

In accordance with section 351.401(c) of the Department's regulations, we note post-sale price adjustments such as invoicing errors and price corrections (as detailed in Attachment B-29-A of respondent's Supplemental Questionnaire Response dated March 30, 2004) are distinct from rebates and that by their very nature these types of post-sale price adjustments do not require a pre-existing agreement in order for the Department to include them in its margin calculations. However, for other sales which are not subject to invoicing errors or price corrections, the Department has accepted billing adjustments offered to customers after the sale, even when the price adjustment more closely resembled a rebate, because price adjustments were offered as part of standard business practice. See Antidumping Duty Manual at Chapter 8, p. 12. We found that the post-sale price adjustments were adopted for commercial purposes related to local Mexican market conditions and Mexinox provided documentation substantiating these price adjustments offered to its customers. See Sections A-C Supplemental Questionnaire Response at 32-33 (March 30, 2004). Mexinox granted discounts to certain distributor/retailer customers over a set period of time as indicated in Sections A-C Supplemental Questionnaire at 33 and Attachment B-29-B (March 30, 2004). As this practice started during the POR, the Department notes that business practices themselves may change and must certainly start at some point in time. We find that this business practice was adopted during the POR for legitimate commercial purposes and in accepting these adjustments, we will be using the most accurate price as paid by Mexinox's customers.

In addition, the Department aims to use the most accurate price as paid by the respondent's customers in establishing normal value. As determined in Wire Rod from Mexico, the Department "will use a price that is net of any price adjustments as defined in 19 CFR section 351.102(b) that is reasonably attributable to a subject merchandise or foreign like product (whichever is applicable)." See Wire Rod from Mexico at Comment 2. The CIT has also affirmed that pursuant to the regulations, the Department has authority to make direct adjustments to any price that is reflected in the buyer's outlay. See Luoyang Bearing Corp. v. United States, Slip Op. 04-53 (CIT 2004). In upholding Department practice to accept billing adjustments which most accurately reflect the price paid by customers, we have allowed Mexinox's reported home market billing adjustments for these final results. See Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France, Germany, Italy, Japan, Romania, Singapore, Sweden, and the United Kingdom; Final Results of Antidumping Duty Administrative Reviews, 63 FR 33320, 33327 (June 18, 1998), and Notice of Final Determination of Sales at Less Than Fair Value: Certain Polyester Staple Fiber from the Republic of Korea, 65 FR 16880 (March 30, 2000).

Regarding petitioners' contention that billing adjustments to a specific customer be disregarded because of a lack of clarity as to their nature, we disagree with petitioners. We confirm that Mexinox has provided sufficient evidence detailing sales to this specific customer, and find that these sales do in fact involve the foreign like product and are within the scope of this review. See Sections A-C Supplemental Questionnaire Response (March 30, 2004) at Attachment B-30. The respondent has provided sales invoices and credit notes on sales which identified internal product codes that corresponded to subject merchandise. See Sections A-C Supplemental Questionnaire Response (March 30, 2004) at Attachment A-7-A and A-27-A.

***Comment 2: Level of Trade***

Petitioners argue that Mexinox has exaggerated and mischaracterized selling functions so as to have home market sales qualify at a single more advanced level of trade (LOT) compared to CEP sales to U.S. customers. Petitioners state that Mexinox's LOT claims are unsupported and should be disregarded.

Petitioners maintain Mexinox has not clearly distinguished selling functions for sales to Mexinox Trading and those sales to other customers, merely asserting that its selling activities with Mexinox Trading were exactly the same as selling activities for unaffiliated distributor retailers. See Petitioner case brief at 19. Petitioners claim Mexinox has not met its burden of proof to support the alleged levels of intensity for its selling activities (including pre-sale technical assistance, price negotiations/ communications, sales calls, warranty services and freight arrangements) to Mexinox Trading and Mexinox USA. They state Mexinox should clearly explain how it provided each service to Mexinox Trading and why these services are determined to be of high or low intensity for specific sales.

In the absence of substantiation of these reported differences in selling functions by Mexinox with respect to its U.S. and Mexican sales affiliates, petitioners maintain the Department should make two adjustments to the final results calculations. First of all, petitioners aver, the Department should consider sales to Mexinox Trading as being at the same LOT as those to Mexinox USA. Second, petitioners urge the Department to perform price comparisons by matching at the same LOT or making an LOT adjustment.

Mexinox supports the Department's preliminary LOT determination and maintains that it is fully substantiated by the record. For the Preliminary Results, Mexinox notes, the Department found only one LOT in the home market which is at a more advanced stage of marketing and distribution than the LOT of Mexinox's CEP sales. See Stainless Steel Sheet and Strip in Coils from Mexico, 69 FR 47905 (August 6, 2004) (Preliminary Results). Respondent therefore states the Department properly determined that Mexinox was entitled to a CEP offset for comparisons between its home market and CEP sales. See Mexinox rebuttal brief at 37.

Mexinox asserts it has provided detailed flowcharts and tables listing and describing selling functions performed for each class of customer in each market. See Section A Questionnaire Response (October 14, 2003) at 32-38 and Attachments A-4-A through A-4-C. Respondent maintains this evidence shows there is no difference in the selling functions performed in connection with sales in the home market to Mexinox Trading and other retail/distributor customers; thus, there is only one LOT. Secondly, Mexinox argues that the LOT in the home market is significantly advanced down the chain of distribution and involves many selling functions that are performed at high levels of intensity. Finally, Mexinox insists the CEP LOT for sales between Mexinox and Mexinox USA is effectively a transfer of inventory between warehouses since most of the selling functions are performed downstream by Mexinox USA.

Mexinox maintains that petitioners have repeatedly challenged this determination throughout every segment of this proceeding and states the facts remain the same. Mexinox claims it has not altered its selling or distribution practices in either market and therefore argues that the Department's findings in the last review should be maintained in this review. Mexinox asserts the Department appropriately determined there was no evidence of significant differences in the services provided to Mexinox Trading as compared to other home market customers, nor any significant differences in the level of intensity of the services provided to Mexinox Trading and other home market customers. Mexinox states that the Preliminary Results are consistent with the Department's findings in the original investigation and the last two administrative reviews and so should remain unchanged in the final results of the instant review. See respondent rebuttal brief at 38.

*Department's Position:* The Department determines, consistent with our finding in the POR3 Final Results, that there is only one LOT in the home market. Consequently, we made no changes to our LOT analysis for these Final Results. We confirm that section 351.412(c)(2) of the Department's regulations states that the Secretary will determine sales are made at different LOTs if they are made at different marketing stages (or their equivalent). To make this determination, the Department reviews factors such as selling functions or services, classes of customer, and the level of selling expenses for each type of sale. Different stages of marketing necessarily involve differences in selling functions, but differences in selling functions, even if substantial, are not alone sufficient to establish a difference in the LOT. Similarly, while customer categories such as distributor and wholesaler may be useful in identifying different LOTs, they are insufficient in themselves to establish that there is a difference in LOT.

For these Final Results, we have evaluated factors such as selling functions or services, customer classes, and the level of selling expenses for home market sales in order to determine whether sales to Mexinox Trading were at a different LOT than Mexinox's other home market sales. In doing so, we have found no evidence on the record demonstrating any significant differences between the services provided to Mexinox Trading as opposed to those provided to other home market customers. Similarly, we have found no evidence of any substantial differences between the level of intensity of the services provided to Mexinox Trading and other home market customers. These services include technical services, warranty services, order processing, price negotiations, inventory maintenance, and freight arrangements. See Section A Questionnaire Response (October 14, 2003) at 32-38 and Attachments A-4-A through A-4-C. As a result, we continue to find there is only one LOT in the home market.

Regarding the U.S. market, Mexinox reported one LOT, the CEP LOT. Mexinox's affiliated entity, Mexinox USA, acts as the importer of record for all four channels of distribution for the United States market and performs most of the selling functions for Mexinox's U.S. customers. These CEP sales consist of merchandise produced to order that was sold directly to unaffiliated U.S. customers, stock sales of finished goods held at the factory in San Luis Potosi to unaffiliated U.S. customers, sales made through Mexinox USA's inventory and downstream sales made through an affiliated reseller, Ken-Mac Metals, Inc. Based on our analysis of the channels of distribution and selling functions performed by Mexinox, we find that Mexinox provided fewer customer sales contacts and visits, technical services, sample analysis, inventory maintenance, customized processing and warranty services in the United States than it did in home market. See Section A Questionnaire Response at 30 and Attachment A-4-C. Mexinox also showed that sales transactions in the U.S. market generally occur at the head of the distribution chain (e.g., Mexinox USA inventory sales to large service centers), whereas sale transactions in the home market generally occur closer to the end of the distribution chain (e.g., retailers and end-users), those of which involve more selling functions, low-volume orders, and a higher degree of service than the comparison CEP transaction LOT.

We determine that home market sales are at a different LOT than the CEP sales and that the difference in levels between NV and CEP affects price comparability. Since there was only one LOT in the home market, there was no data available to determine the existence of a pattern of price differences. Since we do not have information available to compensate for this difference in LOT between NV and CEP sales, we applied a CEP offset to NV for comparison purposes pursuant to section 773(a)(7)(B) of the Tariff Act. We, therefore, continue to find that Mexinox is entitled to this CEP offset adjustment with respect to all sales in the United States.

***Comment 3: Handling Expenses***

Mexinox disputes the Department's revised calculation of handling expenses stated by its affiliate, Mexinox Trading, for home market sales. Mexinox asserts that the actual handling expenses charged by Mexinox Trading should be used because they are at arm's length. Mexinox claims it explained the fee amount is in line with rates that had also been charged for the same service by unaffiliated handling service providers. See Mexinox case brief at 34.

Mexinox states that reported handling expenses for services by Mexinox Trading were based on actual freight and warehousing expenses. Mexinox contends the difference between reported expenses and the lower figure calculated by the Department, is the other services provided by Mexinox Trading and additional administrative functions relevant to the terms of the handling contract.

Mexinox argues the Department's practice is to accept adjustments for actual expenses incurred in connection with services provided by affiliated parties, as long as those actual expenses are demonstrated to be at arm's length. Mexinox maintains it has demonstrated that amounts actually paid by Mexinox for handling services are in fact at arm's length and therefore should be used for the final results.

Petitioners counter Mexinox's claims, stating that actual handling expenses were indeed used by the Department. Petitioners contend the Department properly recalculated home market handling expenses from freight and warehousing expenses, as they were based on real expenses incurred by Mexinox Trading rather than the price charged to affiliates by Mexinox Trading for these services. Petitioners refute Mexinox's attempt to imply that the transfer price paid to its affiliate is the actual handling expense. According to petitioners, the actual expenses were those incurred by Mexinox Trading in handling the merchandise and petitioners state that it is Department practice to use actual expenses preferable to transfer price among affiliates for such type of service.

*Department Position:* Consistent with the POR3 Final Results, in this review we adhered to our practice to calculate expenses based on the actual amounts incurred, rather than the amounts transferred to an affiliated party. Therefore, in this review, we have recalculated Mexinox's handling expenses. In doing so, we have calculated handling expenses (HANDLEH) using the actual expenses incurred by Mexinox Trading rather than including the additional fee charged by Mexinox Trading. We have based this on Mexinox Trading's actual warehousing and freight expenses as reported in Attachment B-37-B of Mexinox's March 30, 2004, Supplemental Questionnaire Response. We have excluded office services and expenses in our recalculation of handling expenses because these expenses are considered administrative expenses, rather than movement expenses. See Analysis Memo at Attachment 3, dated July 29, 2004, from the Preliminary Results. We have therefore, made no change in our treatment of handling expenses from the Preliminary Results.

***Comment 4: Peso-Based Interest Rate for Home Market Sales***.

Respondent insists the Department should use the peso-based interest rate for all home market sales. Mexinox argues that the Department's practice is to require revenues and expenses to be reported in the currency in which they were actually invoiced. Mexinox maintains that in the

Preliminary Results, the Department appropriately calculated normal value for home market sales originally invoiced in U.S. dollars using the peso unit prices reported in field GRSUPRH. Mexinox states that as the Department chose to use the peso-based invoice prices reported in field GRSUPRH, the Department recognized pesos as the currency of the transactions. Accordingly, Mexinox continues, the Department must use a peso-based interest rate to calculate home market credit expenses.

Referring to the Department's Policy Bulletin 98/2, Mexinox states that Department practice is also to impute credit expenses using a short-term borrowing rate in the currency of the sale. See Import Administration Policy Bulletin 98/2, (Imputed Credit Expenses and Interest Rates). However, Mexinox argues the Department improperly based home market credit expense adjustments for these transactions using the variable CREDIT2H, under which Mexinox reported imputed credit expenses using the U.S. dollar short-term interest rate.

For home market sales that were originally invoiced in U.S. dollars, Mexinox reported both the U.S. dollar price as invoiced (in field USDAMTH) and the Mexican peso price (in field GRSUPRH). Mexinox contends that the peso unit price should be used in the margin calculations because that is how sales and receivables are booked and carried forward for accounting purposes, while customers also have the legal right to pay dollar-denominated invoices in pesos. Therefore, Mexinox urges the Department to use the peso figures as reported in the sales listing in the margin program, and to calculate imputed credit expenses using the peso-based short-term interest rate reported by Mexinox. Mexinox argues that imputing credit expenses for these peso-based sales using a dollar-based interest rate is contrary to Department policy.

Alternatively, Mexinox concludes that if the Department, for the final results, determines these transactions are in fact dollar-denominated sales, the Department should use the dollar-denominated prices rather than the peso-based unit prices (reported in field GRSUPRH) as in the Preliminary Results. Mexinox argues this would create a distortion by yielding dollar prices that are different from those actually invoiced to the customer.

Petitioners claim this issue has been raised by the respondent in previous reviews and urge the Department to once again reject Mexinox's request and not use a peso-based interest rate for home market sales. Petitioners maintain that as the sales were transacted in U.S. dollars, the opportunity costs must be based on dollar interest rates irrespective of how the receivables associated with these dollar-denominated sales are carried on Mexinox's books. Therefore, petitioners urge the Department to continue its use of a dollar-based interest rate for home market sales denominated in U.S. dollars.

*Department Position:* It is the Department's normal policy to base calculations of credit expenses upon a short-term interest rate tied to the same currency as the sale. See Import Administration Policy Bulletin 98/2 "Imputed Credit Expenses and Interest Rates" (February 23, 1998). The currency of the sale is based on evidence "determining the amount the purchaser ultimately would pay." See Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea; and Stainless Steel Sheet and Strip in Coils From the Republic of Korea, 66 FR 45279 (August 28, 2001) (Stainless Steel from Korea). See also Final Determination of Sales at Less Than Fair Value: Fresh Cut Flowers From Columbia, 60 FR 6980 (February 6, 1995) (The Department found the currency of the sale to be in U.S. dollars "since home market sales were transacted in dollars and the payments made, although in pesos, were based on constant dollar value"). In making this determination, the Department looks to evidence such as the dollar amount

appearing on the sales invoice, the prices fixed on the date of sale, and the denomination of the invoiced and received payment for the sales in question. See Stainless Steel from Korea. See also, Notice of Final Determination of Sales at Less Than Fair Value: Certain Large Diameter Carbon and Alloy Seemless Standard, Line and Pressure Pipe From Mexico, 65 FR 39358 (June 26, 2000).

We find that in accordance with Department practice the currency of the sales in question is U.S. dollars because the amount the purchaser ultimately would pay is directly linked to a U.S. dollar amount as indicated on U.S. sales invoices. See, e.g., Sections A-C Supplemental Questionnaire Response at Attachment B-25. See also Stainless Steel from Korea. Although both U.S. dollar and peso denominated sales invoices were recorded in Mexinox's accounting system in pesos, the Department finds that this peso value does not transform these U.S. dollar sales into peso sale transactions. When Mexinox negotiates and invoices a U.S. dollar price for its home market sales, it foresees and incurs an opportunity cost linked to that currency - the dollar. See, e.g., Sections A-C Supplemental Questionnaire Response at 29 ("If the customer elects to pay the invoice in Mexican pesos, the payment amount in pesos is determined by applying the exchange rate . . . for the day of payment"). Whether the customer may later remit payment in pesos or Mexinox records the sale in pesos is immaterial. Therefore, consistent with Policy Bulletin 98/2 and our past practice, we will continue to use a U.S. dollar short-term interest rate to calculate credit expenses for dollar-denominated sales.

Pursuant to the Department's practice, we have calculated a monthly CONNUM-specific weighted-average normal value based on the net unit price expressed in pesos for all home market sales. We have then converted this monthly weighted-average normal value in pesos to U.S. dollars using the exchange rate on the date of sale of the subject merchandise in accordance with CFR 351.415.

**Adjustments to United States Price**

***Comment 5: CEP Profit***

Mexinox argues the Department should calculate CEP profit using U.S. and home market data for the same period. Mexinox notes the Department calculated CEP profit based on U.S. sales data over a 12-month period of review, in comparison with home market sales data which cover an extended 17-month home market reporting period.

Mexinox asserts this difference, in fact, distorts profit levels and results in a higher profit calculation in the home market than in the United States. Mexinox urges the Department to calculate CEP profit rate on 12-month data from both markets. Mexinox also proposes that the Department recalculate CEP profit using only U.S. and home market sales made during the 12-month POR. Mexinox suggests this would ensure that the CEP profit rate reflects accurately both the U.S. and home market profit rates.

Petitioners refute Mexinox's claim and urge the Department to continue to base its calculation of CEP profit in part on the extended window period data. Petitioners highlight that the comparison market sales used for the profit calculation are the same as those used for the cost test, arms length test, and fair value comparison. Petitioners argue that excluding certain period

sales from the CEP profit calculation would not be balanced and insist the Department should reject Mexinox's request to ignore the extended window month sales.

*Department Position:* In determining normal value, the Department is directed by section 772(f)(1) of the Tariff Act to determine profit by multiplying the total actual profit by the applicable percentage. Section 772 (f)(2) further defines "applicable percentage" as the percentage determined by dividing the total U.S. expenses by the total expenses. The Department has interpreted total actual profit as defined by section 772(f)(2)(D) to include all revenues and expenses resulting from the respondent's EP sales, as well as from its CEP and home market sales. See Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 62 FR 18476 (April 15, 1997) (Cold-Rolled from the Netherlands).

As we stated in Cold-Rolled from the Netherlands:

> The basis for total actual profit is the same as the basis for total expenses under section 772(f)(2)(C). The first alternative under this section states that for purposes of determining profit, the term "total expenses" refers to all expenses incurred with respect to the subject merchandise, as well as home market expenses. Where the respondent makes both EP and CEP sales to the United States, sales of the subject merchandise would encompass all such transactions.

See Cold-Rolled from the Netherlands, 62 FR at 18478.

This methodology is consistent with our treatment of this issue in previous administrative reviews of this order, and is identical to our practice as articulated in Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands: Final Results of Antidumping Duty Administrative Review, 69 FR 33630 (June 16, 2004).

The expenses requested by the Department for the purpose of establishing normal value of the foreign like product were those incurred during the extended window period. In accordance with the statute, these expenses are to be used in the calculation of the CEP profit ratio. See section 772(f)(2) of the Tariff Act; see also Import Administration Policy Bulletin 97/1 "Calculation of Profit for Constructed Export Price Transactions" (September 4, 1997).

Accordingly, we disagree with the argument that the Department should calculate CEP profit using unextended home market sales data. Therefore, we have made no changes to our methodology for calculating CEP profit in these final results.

***Comment 6: Bankruptcy-Related Bad Debt***

Petitioners contend a bad-debt expense adjustment must be made in accordance with the Department's methodology in the previous review by including bad debt arising from customer bankruptcies. Petitioners state that in the POR3 Final Results, the Department based bad debt expense on actual bad debt incurred by Mexinox USA during the five years prior to the POR.

See POR3 Final Results and accompanying Issues and Decision Memorandum at 27. However, petitioners argue this final notice did not state that the Department was considering only bad debt unrelated to bankruptcy.

In contrast, for the Preliminary Results, petitioners state the Department again improperly excluded from consideration bad debt related to bankruptcy – as opposed to expenses termed actual bad debt. See Preliminary Results Calculation Memorandum at 12 and Attachment 1A. See also Petitioner case brief at 13. Petitioners maintain that customer bankruptcy is likely to be a leading component of any company's bad debt and cannot be excluded as not relating to actual bad debt.

Petitioners refer to the POR3 analysis in which the Department stated it considers whether or not it can determine an amount of bad-debt expense that could be reasonably anticipated based on the historical experience of the company. See POR3 Final Results and accompanying Issues and Decision Memorandum at comment 6. Petitioners reject Mexinox's attempt to distinguish between actual bad debt and unforeseen bankruptcy-related bad debt, and maintain there is no basis under the Department's reasonably anticipated standard for excluding Mexinox's bad debt from the historical analysis.

Mexinox argues the Department correctly disregarded the extraordinary 2001 bankruptcy-related bad debt in adjusting for bad debt. Mexinox asserts the Department has followed the exact same methodology used in the previous review, whereby the Department accounted for Mexinox USA's historical bad debt experience during the five-year period prior to the POR (i.e., July 1997 through June 2002), excluding certain bad debt expenses incurred in connection with the extraordinary bankruptcies of 2001.

Mexinox maintains that the exclusion of extraordinary bad debt amounts from indirect selling expenses (ISEs) is required by law and reflects established Department practice. Mexinox argues this policy traces to the Department's implementation of the World Trade Organization (WTO) panel decision in United States – Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip in Coils which addressed whether or not it was permissible for the Department to adjust export prices for expenses incurred in connection to unforeseen events. The WTO determined that it was not permissible to adjust export prices for expenses "incurred in connection with entirely unforeseeable events; costs that could not possibly have been built into the price by the seller." See WT/DS179/R (February 1, 2001). The Department agreed to implement this policy and has since included amounts for bad debt in the ISE ratio to the extent that such expenses "could be reasonably anticipated based on the historical experience of the company." See Cold-Rolled Carbon Steel Flat Products from the Netherlands, 67 FR 62112, Final Issues and Decision Memorandum (October 3, 2002) at comment 9. See also POR3 Final Results and accompanying Issues and Decision Memorandum at comment 6.

Mexinox argues the POR3 Final Results identified the circumstances of the extraordinary 2001 bankruptcies as unforeseen and occurring as a result of unprecedented events, including the September 11 attacks and their subsequent effect on the steel industry. See POR3 Final Results and accompanying Issues and Decision Memorandum at comment 6. Mexinox contends there was nothing in the company's history with the specific bankrupt customers to warrant concern and maintains that before their bankruptcies, these customers had exemplary payment histories that could not reasonably have led Mexinox to view them as credit risks.

Mexinox further asserts the Department's policy is to adjust for bad debt only to the extent that such bad debt was foreseeable at the time of sale and therefore could have been built into the price. As the Department noted in the final results of the last review, its practice is to determine the amount of bad debt that "could be reasonably anticipated based on the historical experience

of the company." See POR3 Final Results and accompanying Issues and Decision Memorandum at comment 6. Mexinox claims it demonstrated to the Department's satisfaction during the last review that the 2001 bankruptcies were extraordinary and unforeseen, and so were excluded from the ISE calculation in accordance with established agency practice. Mexinox asserts there is no inconsistency between the Department's bad-debt methodology in this review and the last review.

*Department Position:* In this review, we have applied the same methodology applied in the previous review, which is to base bad debt on foreseeable expenses. Even though we agree with petitioners that certain bad-debt expense should be included in the margin calculation, we also determine the amount of bad-debt expense must be reasonably anticipated based on the historical experience of the company. See POR3 Final Results. See, also, Notice of Amendment of Final Determinations of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From the Republic of Korea, 66 FR 45279 (August 28, 2001) and Notice of Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands, 67 FR 62112 (October 3, 2002) and the accompanying Issues and Decision Memorandum at Comment 9. We find an adjustment for bad debt is warranted based on Mexinox USA's historical experience. The record indicates that Mexinox USA did have a bad debt account and experienced bad debt in years prior to the POR, thereby expecting to incur some bad debt during this POR. See, e.g., Mexinox Supplemental Questionnaire Response (March 1, 2004) at Attachment C-26-A.

We are basing the bad-debt expense on the actual bad debt unrelated to bankruptcy incurred by Mexinox USA during the previous five years prior to the POR. We determine these specific bankruptcy-related bad-debt items were extraordinary in nature and unforeseeable at the time of sale. Because we have based this actual bad-debt expense on the bad debt incurred on all sales, including both subject and non-subject merchandise, we have included this amount in the numerator of the U.S. indirect selling expense (ISE) calculation. We have made no changes with respect to accounting for bad debt from the Preliminary Results.

***Comment 7: Certain Service Expenses Recorded by Mexinox USA***

Mexinox USA recorded certain service expenses of a proprietary nature in its audited financial statements and petitioners claim these amounts should be included as a U.S. ISE.[2] See Petitioner case brief at 15 and Mexinox USA's audited financial statements in Section A Questionnaire Response at Attachment A-11-B to (October 14, 2003). Even though Mexinox USA listed these expenses separately from other general and administrative (G&A) expenses, petitioners suggest that the Department add these service expenses, as noted in the audited financial statements, to the numerator to recalculate the "INDIRSU" ratio.

In rebuttal, Mexinox claims the Department properly excluded these service expenses from U.S. selling expenses. Mexinox counters that petitioners do not explain why the amount should be added to U.S. ISEs, as the Department has never before included these amounts in Mexinox's U.S. ISEs. Mexinox further maintains that it would be inappropriate for the Department to include this amount in the U.S. ISEs for two reasons. First, Mexinox asserts that the amounts are not selling expenses, but rather the amounts refer to payments from Mexinox USA to Mexinox S.A. for general services. See Mexinox rebuttal brief at 28.

[2] Details of this certain service expense are found in our Analysis Memorandum dated January 14, 2004.

Second, Mexinox claims that even if these services were considered "selling" expenses, they do not qualify as deductions from EP as ISEs under the Department's regulations. Referring to 19 CFR section 351.402(b), Mexinox states that in order to be deducted from U.S. prices, such expenses must relate to "commercial activities in the U.S." Mexinox asserts that the services in question were conducted outside the United States by Mexinox USA's parent. Mexinox also argues that according to Department practice, the expense must relate to the subsidiary's downstream sales to its unaffiliated customers, and not to the sale between respondent and its subsidiary. See Mexinox rebuttal brief at 29. Mexinox affirms that this is not the situation in this case, and asserts the expense in question relates to activities unrelated to downstream sales by Mexinox USA.

*Department Position:* As in POR 3 Final Results, we continue to exclude certain service expenses from our calculation of U.S. ISEs. Our regulations at 19 CFR section 351.204(b) state that in establishing CEP under section 772(d) of the Tariff Act, the Department will make adjustments for expenses associated with commercial activities in the United States that relate to the sale to an unaffiliated purchaser. Based on the record, we determine that these service expenses are unrelated to economic activity in the United States and to sales between Mexinox and its unaffiliated U.S. customers. The Department concludes that these expenses are general and administrative in nature and the services in question were conducted outside the United States. See Analysis Memo and Sections A-C Supplemental Questionnaire Response at 59 (March 30, 2004). Thus, in accordance with 772(d) of the Tariff Act, 19 CFR section 351.204(b) and POR 3 Final Results, we do not consider these service expenses to be selling expenses and continue to exclude them in the calculation of the U.S. ISEs in these final results.

**Cost of Production**

***Comment 8: Monthly Averaging of Costs of Raw Material Inputs***

Mexinox objects to the Department's use of POR-average costs for austenitic products (i.e., series 300 grades) and urges the use of monthly costs in the review due to the fact that during the POR, nickel prices rose sharply and consistently. According to published prices of the London Metals Exchange (LME) cited by Mexinox in Attachment D-17 of its Section D Questionnaire Response (November 20, 2003), average cash prices for nickel were at $7,146 per ton in July 2002. Average cash prices for nickel had increased 24 percent and reached $8,878 per ton by June 2003, and rose a further 24 percent by October 2003 reaching $11,052 per ton at that period.

Mexinox states the cost of nickel is a significant percentage of its total cost of production (COP) for austenitic grades of stainless steel, thus, directly affecting its cost for its chief input, hot bands. Mexinox maintains the consistently increasing nickel prices also had a direct inflationary impact on raw material (hot band) costs for the austenitic grades of steel that include nickel. Mexinox argues that in calculating COP for the Preliminary Results, the use of average costs leads to distortions in the cost comparisons and margin calculations. Additionally, Mexinox claims that in accordance with industry practice, its costs and prices for austenitic products were adjusted monthly in relation to the cost of nickel, and that it added surcharges to customer prices in order to pass through rising nickel prices to downstream customers. See Mexinox case brief at 9-22.

Mexinox cites Brass Sheet from the Netherlands as a previous example of the Department's use of monthly raw material costs where the Department stated "by using weighted-average monthly price fixed metal cost, we are able to make a contemporaneous comparison of metal values which result in a more accurate calculation of the margin of dumping in this case than using either the reported quarterly or POR weighted average costs." See Final Results of

Antidumping Duty Administrative Review Brass Sheet and Strip from the Netherlands, 65 FR 742, 747 (January 6, 2000). Mexinox argues the same circumstance applies in this case and urges the Department to use reported monthly costs for austenitic products to achieve accuracy in the calculation of dumping margins.

Petitioners argue that monthly nickel costs should not be used to adjust Mexinox's reported costs during the POR for three reasons. Petitioners claim Mexinox improperly bases its request for the use of monthly nickel costs on the price of nickel alone, rather than on hot bands for which price changes were not significant. Petitioners also argue that nickel is not a significant input to Mexinox's manufacturing and admit that although nickel can be an important element to stainless steel manufacturing operations in fully integrated steel melting operations, the main raw material inputs for Mexinox are in fact ferritic and austenitic hot bands rather than nickel. Petitioners claim that Mexinox's manufacturing operations consist exclusively of re-rolling hot bands into subject sheet and strip, rather than melting steel from raw materials. Thus, any fluctuations in nickel prices are already fully captured in the prices Mexinox pays for these hot bands.

Petitioners also dispute Mexinox's analysis of nickel prices and point out that the price data presented by Mexinox in its Section D Questionnaire Response are not sufficient to justify use of monthly average costs. Petitioners maintain price changes for Mexinox's major raw material inputs were not significant and did not increase at a sharp and steady pace. Petitioners argue that Mexinox's claim of a 24-percent increase in nickel prices in fact was realized over only a two-month period in January and February 2003. Rather, petitioners highlight that nickel prices fluctuated downwards at the beginning of the POR from August through October 2002, and declined again between February through March 2003. Petitioners argue that month-over-month price changes for hot bands were in fact minor. Petitioners also insist the cost data show little difference in the price changes between the representative austenitic (i.e., grade 304) and ferritic (i.e., grade 430) hot bands. Finally, petitioners dispute Mexinox's assertions that surcharges were added to the nickel component of Mexinox's hot band purchases from its suppliers and its resales of finished cold rolled products to customers. Petitioners state that there is no evidence supporting that both the prices it paid for hot bands and the prices it charged for its subject merchandise were reflected nickel surcharges. See Petitioners rebuttal brief at 6.

Petitioners state that fluctuating material costs and the level to which they are reported downstream to customers does not warrant comparison to monthly costs used in the Brass Sheet and Strip in the Netherlands. Petitioners assert that the circumstances in Brass Sheet and Strip in the Netherlands were different than the circumstances in this review. Petitioners add that even if nickel were considered a major input to Mexinox's operations, the Department has previously rejected proposals that inflation in the price of an individual input necessitates the use of monthly costs. See Notice of Final Determination of Sales at Less than Fair Value Stainless Steel Round Wire from Korea, 64 FR 17342 (April 9, 1999). As a result, petitioners urge the Department to maintain its normal practice of using POR weighted-average costs for the final results.

*Department Position:* The Department finds that the annual weighted-average direct material costs should not be adjusted for the fluctuation in monthly nickel prices during the POR. Based on our assessment of the information on the record, we continue to follow the same calculation methodology as that used in the Preliminary Results.

In the absence of high inflation, the Department's normal practice is to calculate a single weighted-average cost for the entire POR unless this methodology results in inappropriate comparisons. As stated in Certain Pasta from Italy, the Department has previously used

monthly or quarterly costs in instances of non-inflation only when there is a single primary-input product and that input experiences a significant and consistent decline or rise in its cost throughout the reporting period. See Certain Pasta from Italy; Final Results of Antidumping Duty Administrative Review, 65 FR 77852 (December 13, 2000) and accompanying Issues and Decision Memorandum at comment 18. See also Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke the Antidumping Order: Brass Sheet and Strip from the Netherlands, 65 FR 742,746 (January 5, 2000).

Conversely, when there are inconsistent fluctuations in both directions, we use a single weighted-average cost for the entire POR. See, e.g., Fujitsu General Ltd. v. United States, 88 F.3d 1034, 1038-39 (Fed. Cir. 1996) (where the court noted no significant cost rise from the beginning to the end of the POR and approved costs constructed on an annual basis). Moreover, we disagree with Mexinox's claim that the cost of nickel rose sharply and consistently throughout the POR. In fact, based on LME nickel price data submitted by Mexinox, we find there was not an increasing trend in nickel prices, but rather inconsistent fluctuation throughout the POR. See Attachment 1 of Mexinox's case brief and Attachment D-35 of Supplemental Questionnaire Response (April 27, 2004). Based on the foregoing, we conclude that neither nickel nor purchased hot band prices rose significantly enough to warrant a deviation from our practice of using single weighted-average COP for the POR.

***Comment 9: Annealing and Pickling Cost Adjustment***

Mexinox states that in the first supplemental cost questionnaire response, it provided a correction to reported costs to reflect an error discovered in the calculation of transformation costs for annealing and pickling line 2 (APL2). Mexinox states this cost is related to the processing of certain ferritic products and maintains that it provided an adjustment in the field "APL2ADJ." See Mexinox case brief at 23. However, Mexinox argues that the Department did not apply the provided APL2 adjustment in the Preliminary Results. Mexinox suggests the omission appears to be a ministerial error, and urges that it be corrected for the final results.

Petitioners argue that the APL2 cost adjustment should not be applied, stating there was not adequate explanation or reason for the adjustment. Petitioners maintain that Mexinox merely presented the information in a footnote of the Supplemental Cost Response. See Supplemental Questionnaire Response (April 27, 2004) at 28, note 19. Petitioners state that Mexinox admits to have allocated specific costs to a small quantity of ferritic material but that the effect of this error was actually allocated to specific austenitic material. As the claimed adjustment was unsolicited and insufficiently explained, petitioners urge the Department to apply an adverse interference and either reject the adjustment outright, or apply adverse facts available to adjust for this correction.

*Department Position:* We accept Mexinox's revised annealing and pickling adjustment for these final results. Through further analysis we confirm that Mexinox recalculated transformation costs which had not originally been allocated to certain ferritic material that was processed on annealing and pickling line 2. In correcting for this, Mexinox deallocated costs from austenitic grades while allocating them to the subject ferritic material. See Supplemental Section D Response at 27-28 and Attachment D-33 (April 27, 2004). We determine that this is a reasonable adjustment and have appropriately used the revised figures in our calculation.

***Comment 10: General and Administrative Expenses***

Mexinox claims its G&A expense ratio was overstated in three areas of the preliminary results calculation. First, Mexinox argues the Department incorrectly calculated the G&A factor to reflect a general cost provision related to the devaluation of work-in-process (WIP). Mexinox states this factor has been double-counted, arguing that the general cost provision related to

work-in-process had already been included by Mexinox in its cost of manufacturing (COM) data. Mexinox argues the Department also overstated this adjustment to the general cost provision related to WIP, because it included the finished goods portion of the cost provision along with the work-in-process portions.

Second, Mexinox challenges the Department's calculation of the cost of goods sold (COGS) denominator and maintains that it improperly adjusted the COGS denominator for costs excluded from COM. The Department adjusted certain variables so as to allow for symmetry between the COGS denominator used in the calculation of the G&A ratio and the COM. These variables included Valuation Errors, Cost of Scrap Sales, Extraordinary Operations, Maquila Costs, Finished Goods Return to WIP and Finished Goods Inventory Movement. However, Mexinox suggests these adjustments did not attain full symmetry because the Department did not exclude additional items – the Coating Cost Variation and the General Cost Provision Related to Finished Goods – in the COGS whereas those items were properly excluded from the reported COM.

Mexinox also argues the Department overstated the adjustment to reported Extraordinary Costs. The Department deducted the whole reported amount, whereas only a portion of the amount was excluded from the reported COM. See Mexinox case brief at 27. Mexinox urges the Department to correct both the numerator and denominator errors.

Petitioners do not comment on G&A expenses, except to urge the Department to ensure all adjustments result in a G&A denominator that is symmetrical with the adjusted cost of manufacturing.

*Department Position:* We determine that the adjustment made to the G&A numerator in the Preliminary Results should not be used in these final results. The adjustment applied in the Preliminary Results related to the general cost provision, which includes a portion of both WIP and finished goods, as indicated in Mexinox's Supplemental Questionnaire Response dated April 27, 2004. We find the WIP portion of the general cost provision is included in the reported COM, thus adjusting the G&A numerator by this portion would essentially double-count this cost item. However, the finished goods portion of the general cost provision is excluded from COM, consequently this adjustment is inflated due to the inclusion of this portion. Accordingly, we are using the original G&A expense as reported in these final results.

We also agree with Mexinox that further adjustments must be made to attain symmetry between the COGS denominator used to calculate the G&A rate and the reported COM to which it was applied. In order to exclude cost items in the COGS denominator for those items excluded from the reported COM, we are making the following adjustments. We are continuing to make a deduction for Extraordinary Costs, although we are now only deducting the portion which was excluded from the reported COM. We also are deducting two additional cost items, coating cost variation and the general cost provision for finished goods, in which a part of their total costs were excluded from COM. See Attachment 1 of the Final Analysis Memorandum for the calculation.

***Comment 11: Financial Expenses***

Mexinox claims errors were made in calculating the net interest expense (INTEX) ratio in three areas. First, Mexinox maintains the interest income offset should be accepted as reported. Mexinox states it had reported an INTEX figure at the consolidated TKAG level and offset the total interest expense (both long and short term) with short term interest income as reported in the audited consolidated financial statements. Mexinox claims that it documented each of the income items comprising the offset as: 1) interest related or 2) short-term in nature. The company argues the Department improperly rejected the reported short-term interest expense

offset and contends that only a very small amount of the short-term interest income is not self-evidently short-term in nature. Mexinox claims the other interest income items are both interest income and short-term in nature and are properly used to offset the interest expense, arguing the Department should not have rejected the reported short-term interest income offset.

Petitioners state that Mexinox's breakdown of allegedly short-term income items does not clearly show that they are short-term in nature. Petitioners claim the majority of this income alleged by Mexinox to be short-term in nature, has been rejected by the Department in the previous two reviews. Petitioners urge that the Department treat these items in the current review in the same manner.

Second, Mexinox avers the interest expense factor revised by the Department was overstated by including the entire miscellaneous financial expense in the net interest expense denominator when only a portion is interest related. Mexinox claims it provided a breakdown of the miscellaneous financial expenses in its supplemental response which identified the interest expenses as well as portions not interest-related. See Supplemental Response (April 27, 2004) Attachment D-37-A. Mexinox contends the miscellaneous expenses at issue are not finance-related and should therefore be excluded from the numerator.

Petitioners urge the Department to continue to include the miscellaneous financial expenses as interest expenses, which has been the Department's practice in previous reviews. See POR3 Final Results and accompanying Issues and Decision Memorandum at comment 15. Petitioners contend that all of the items listed are considered financial expenses; thus, are properly included in the ratio numerator.

Third, Mexinox argues that the Department incorrectly adjusted the interest expense factor for packing expenses in the Preliminary Results. Respondent argues that the cost of sales denominator used in the calculation of the interest expense rate was adjusted incorrectly for packing expenses. Mexinox states the Department estimated the amount of packing expenses to adjust the cost of sales at the consolidated TKAG level by using the ratio of packing expenses to COGS recorded by Mexinox at its stainless operations. While respondent agrees that the adjustment to the COGS denominator for packing costs is appropriate, it claims the manner in which the adjustment was made is not. According to Mexinox, this is because the consolidated TKAG entity comprises a vast array of companies involved in diverse activities, ranging from real estate management to elevator construction. Under these circumstances it is not reasonable to apply the respondent's unique experience as a stainless steel producer to the consolidated costs of its parent, TKAG.

Petitioners contend the Department should reject Mexinox's argument that the Department improperly applied a financial expense ratio calculated using a packing-exclusive denominator. Petitioners claim this argument is without merit and state that the Department has applied the same practice in other cases. For example, petitioners refer to the Final Determination of the Antidumping Duty Investigation of Stainless Steel Bar from Korea, 67 FR 3149 (January 23, 2002) and accompanying Issues and Decision Memorandum. Petitioners claim the Department rejected this same argument in the POR3 Final Results and urge the Department to refuse Mexinox's request to revise the financial expense ratio denominator.

*Department Position:* It is the Department's long standing practice to offset interest expense by short-term interest income generated from a company's working capital (i.e., cash and cash equivalents). See Final Results of Stainless Steel Sheet and Strip in Coils from Germany 69 FR 75930 (December 20, 2004) and accompanying Issues and Decision Memorandum at comment 2 (Sheet and Strip in Coils from Germany). Upon reviewing information on the record, the Department notes the majority of the reported short-term interest income was

related to assets not considered working capital. Therefore, we continue to reject Mexinox's reported offset to interest expense for the final results. In order to maintain its operations and business activities, the company must maintain a working capital reserve to meet its daily cash requirements (i.e. payroll, suppliers, etc.). In our review of TKAG's fiscal year (FY) 2003 consolidated balance sheet, we noted it contained amounts for cash and cash equivalents. The Department allowed Mexinox to offset its financial expense with the estimated short-term interest income earned from its working capital. This treatment is consistent with that employed in the previous administrative reviews. See Final Results of Stainless Steel Sheet and Strip in Coils from Mexico 2000-2001 Antidumping Duty Administrative Review, 68 FR 6889 (February 11, 2003) and accompanying Issues and Decision Memorandum (POR 2 Final Results) and POR 3 Final Results.

In order to calculate an accurate financial expense rate, the Department considers the entire financing activities of the company. We determine that miscellaneous financial expenses that are clearly finance-related should be included in the numerator of total interest expense. We reviewed footnote 7, "Breakout of Net Miscellaneous within Net Financial Expense" from Mexinox's FY 2003 financial statements. From this, we determined a portion of the total miscellaneous expense (i.e. loss/gain from disposal of securitized assets) was not finance-related; thus, it should be excluded from the numerator in the financial expense rate calculation. See Analysis Memo at Attachment 2a and 2b.

With regard to packing expenses, it is the Department's normal practice to exclude packing expenses from the interest expense rate calculation and based on the best information available on the record, the Department determined that estimating TKAG's consolidated packing expenses is reasonable. See Cold Rolled Carbon Steel Flat Products from Germany; Notice of Final Determination of Sales at Less Than Fair Value, 67 FR 62116 (October 3, 2002) and accompanying Issues and Decision Memorandum at comment 17. Thus, for the final results, we continued to estimate TKAG's consolidated packing expenses based on the ratio of packing expenses to COGS experienced by Mexinox, and deducted them from the consolidated cost of sales used as the denominator for the interest expense rate calculation.

INTEX was then included in the total COP for purposes of the cost test in the margin calculation program and also in the cost-build-up for purposes of the major input analysis. See Analysis Memo at Attachments 2 and 3.

***Comment 12: Below-Cost Test***

For the Preliminary Results the Department's margin program conducted the below-cost test separately for sales of prime and non-prime merchandise of the same control number. Mexinox argues the Department should not conduct the below-cost test separately for prime and non-prime products and maintains that this practice was never applied in previous reviews of Mexinox.

Mexinox argues that it complied with the Department's instructions and reported a single weighted-average COP for each product sold (control number or CONNUM). Mexinox states that Department instructions order that a distinction of prime and non-prime not be used in the construction of control numbers and refers to the Department's glossary included in the Section D Questionnaire which states the below-cost test applies on a product-specific basis. See Mexinox case brief at 33.

Mexinox maintains the Department has determined that the below-cost test should not distinguish between prime and non-prime merchandise where both types of merchandise go through the same production process and involve the same production costs irrespective of quality. Mexinox claims that the determination of whether the product is of prime or secondary quality is made after the production process is completed and all production costs are incurred. For purposes of the final results, Mexinox urges the Department to conduct the test by CONNUM as it has done in the previous reviews and in other similar cases. See Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea, 61 FR 35177, 35182 (July 5, 1999).

Petitioners counter this by arguing that separately testing for prime and nonprime products has been standard Department policy. See Notice of Final Determination of Sales at Less than Fair Value: Stainless Steel Plate in Coils from Republic of Korea, 64 FR 15443 (March 31,1999). Petitioners continue that should the Department accept Mexinox's argument to separately test prime and non-prime merchandise, the Department should at least establish a clear policy that ensures uniform application of its new practice in reviews of all products.

*Department Position:* The Department's standard practice is to conduct the below-cost test separately for prime and non-prime merchandise. Appendix V of the Department's questionnaire refers parties to an April 19, 1995, memorandum in the first administrative review of Certain Carbon Steel Flat Products which details Department policy in treating non-prime merchandise (seconds) with respect to product concordance, arm's length test, calculation of foreign market value (now normal value) and the cost test. In regard to below-cost sales, the Department has determined that separating prime merchandise from secondary merchandise secures a more accurate representation of a company's selling practices. Furthermore, separating prime and seconds for the cost test has the benefit of facilitating an untainted analysis of the majority of the sales (prime merchandise) in the cost test. That is, only sales of prime would not be found to be below the COP soley because the analysis was based on prime and seconds combined. See Memorandum to Joseph A. Spetrini, Deputy Assistant Secretary for Compliance from Roland L. MacDonald, Director, Office of Agreements Compliance regarding Treatment of Non-Prime Merchandise for the First Administrative Review of Certain Carbon Steel Flat Products at 4 (April 19, 1995).

Accordingly, for the below-cost test we will continue to compare separately the home market prices for prime and non-prime merchandise to their respective fully captured costs of production, consistent with our established practice. See Certain Corrosion Resistant Carbon Steel Flat Products From Canada: Final Results of Antidumping Duty Administrative Review, 69 FR 2566 (January 16, 2004).

***Comment 13: Pricing in Major Input Analysis***

Petitioners argue the respondent inappropriately adjusted reported prices paid for hot bands so as to equalize the payment terms that it negotiated between affiliates and non-affiliates. See Supplemental Questionnaire Response (July 6, 2004) at 14 and Attachment D-41-B. Petitioners argue that such revisions to actual costs are prohibited by Department regulations. Petitioners affirm that Mexinox reported prices for hot bands purchased from both affiliated and unaffiliated suppliers. See Petitioner case brief at 22. Petitioners argue that in reporting market prices for the major inputs analysis, Mexinox originally reported prices it paid to Mexinox USA, rather than the actual prices it paid to unaffiliated suppliers. However, at the Department's request Mexinox did eventually report its actual market prices in the Supplemental Questionnaire Response (July 6, 2004) at 14. See Petitioner case brief at 22.

Petitioners cite 19 CFR section 351.401(d) which states, "where cost is the basis for determining the amount of an adjustment to export price, constructed export price, or normal value, the Secretary will not factor in any delayed payment or pre-payment of expenses by the exporter or producer." From this, petitioners argue that it is incorrect to adjust a component of the major input analysis for different payment terms. Petitioners urge the Department to correct this and they also propose an increase of all "Impact on DIRMAT" adjustment factors calculated for each grade so as to correct Mexinox's improper adjustment of reported figures.

Mexinox states the Department properly equalized for differences in payment terms in the major inputs analysis as the payment terms between Mexinox's affiliates ThyssenKrupp Nirosta GmbH (TKN) and ThyssenKrupp Acciai Speciali Terni S.p.A. (TKAST) and those from unaffiliated suppliers are very different. Mexinox argues that in order to provide a fair comparison of prices among purchases of hot bands between these two sources, respondent adjusted the market price so as to equalize the payment terms.

Mexinox objects to petitioners' claims that such adjustments are in violation of section 351.401(d) of the Department's regulations, arguing that this regulation does not apply to cost calculations, nor to the major inputs analysis. Mexinox states that section 351.401(d) addresses adjustments to EP, CEP, and normal value. Respondent maintains that the actual adjustment in question was not made to either EP, CEP, or normal value but rather was made to the purchase price of raw material inputs so as to preserve a fair comparison of prices from differing sources. Mexinox asserts that such adjustments to the major inputs analysis are established Department practice and cites the final determination in the original investigation which states: "we agree with Mexinox that an equalization adjustment should be applied in order to perform adequately a fair price comparison. That is, in making the comparison of transfer price to market price, we adjusted the differences in the specifics of the transactions between the affiliated and unaffiliated suppliers." See Stainless Steel Sheet and Strip in Coils from Mexico 64 FR 30790, 30817 (June 8, 1999).

Respondent claims the Department has been clear that an adjustment should be made for differences in the specifics of a transaction between affiliates and non-affiliates in comparing transfer prices to market prices, citing Stainless Steel Wire Rod from Taiwan, 63 FR 40461, 40471- 40472 (July 28, 1998). Mexinox insists that the adjustment is a necessary measure to ensure that the results of the major inputs analysis are not distorted by significant differences in payment terms between sources. Mexinox therefore urges the Department to uphold its decision on this issue from the original investigation and reject petitioners' argument.

*Department Position:* We find that during the POR, Mexinox USA purchased raw material inputs from both unaffiliated and affiliated parties. We based market prices on purchases from unaffiliated suppliers. We based transfer prices on major inputs purchased from its affiliates, TKN and TKAST. According to company officials, the major inputs purchased from TKN and TKAST were first invoiced to affiliate ThyssenKrupp Stainless Export Gmbh (TKSE), which invoiced Mexinox USA, and finally invoiced to Mexinox S.A. The reported raw material costs in the cost file were based on the transfer price from Mexinox USA to Mexinox S.A. Initially, Mexinox submitted transfer prices based on the invoice prices from TKSE to Mexinox USA, instead of the invoice prices from Mexinox USA to Mexinox S.A. See Section D Questionnaire Response dated November 20, 2003 at D-10. According to section 773(f)(1)(A) of the Tariff Act, costs shall normally be calculated based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country. In the Preliminary Results, we used the transfer prices as actually booked in Mexinox's cost accounting system (i.e., the

transfer prices from Mexinox USA to Mexinox S.A.) as submitted in Mexinox Supplemental Questionnaire Response dated July 6, 2004.

Since the final reported transfer prices used in the major input analysis were based on invoice prices from Mexinox USA to Mexinox as recorded in Mexinox's normal books and records, there is no adjustment in question. Mexinox's documentation of the adjustment at issue and the commission charged by Mexinox USA to Mexinox, was merely intended to demonstrate the entire purchasing chain from the affiliated supplier to Mexinox S.A. Thus, the adjustments at question merely demonstrate the connection between the invoice price charged by TKSE to Mexinox USA and the invoice price charged by Mexinox USA to Mexinox S.A. This evidence on the record demonstrates how the TKSE invoice price, plus adjustments, equals the Mexinox USA invoice price. See Supplemental Questionnaire Response dated July 6, 2004 at Attachment D-41. The Department determined that the adjustment at issue did not represent an imputed credit adjustment as asserted by the petitioners, but rather shows how the transfer prices from the TKSE relate to the transfer prices as booked in Mexinox's normal books and records. We have therefore continued to rely on Mexinox's costs as reported in their normal books and records in our Final Results.

***Comment 14: Cost Build-Up in Major Input Analysis***

Petitioners note that in the Preliminary Results calculations, the Department added an amount to reported affiliated supplier costs in order to account for Mexinox USA selling expenses. See Preliminary Results Calculation Memorandum at 3 and Attachment 5. Petitioners contend that for the final results, the Department should similarly apply costs for expenses incurred by affiliate TKSE, which petitioners note is the intermediary in transactions between affiliated manufacturers and Mexinox USA. See, e.g., Supplemental Questionnaire Response dated July 6, 2004 at Attachment D-41-A. Petitioners argue that this adjustment is necessary to fully quantify and include in costs and prices all expenses incurred by TKSE in the purchase and handling of hot bands.

Mexinox contends that it, in fact, properly included TKSE expenses in the major inputs analysis. Respondent notes it stated in its Sections A-C Supplemental Questionnaire response that the cost build-ups provided for purposes of the major inputs analysis include a factor reflecting the full amount of SG&A incurred by TKSE. See Mexinox rebuttal brief at 40. In addition, Mexinox argues that these expenses are in the revised major inputs worksheets provided in Attachment D-21 to Mexinox's Section D Supplemental Questionnaire Response (April 27, 2004).

Mexinox maintains that this cost build-up information, inclusive of TKSE expenses, was applied in the major inputs analysis used to test the acceptability of, and to determine adjustments to, raw materials purchased from Mexinox's affiliates, TKN and TKAST.

*Department Position:* We determine that Mexinox has fully accounted for the TKSE expenses in the major inputs analysis. TKSE serves as a trading company handling the export of TKAST and TKN hot-rolled stainless steel coils to Mexinox USA. TKSE's actual G&A expenses are included in the underlying cost build-ups for black band and white band supplied by TKAST and TKN that were used in the major inputs analysis. See Sections A-C Supplemental Questionnaire Response (March 30, 2004) at 6 and 7. The reported hot band costs already fully reflect any TKSE expenses as identified by the SG&A ratio for TKSE in the COP. See Mexinox Section D Supplemental Questionnaire Response (April 27, 2004) Major Inputs Attachment D-21-C.

**Margin Calculations**

***Comment 15: Repurchase of ThyssenKrupp AG Shares***

Petitioners argue the Department should adjust Mexinox's U.S. selling expenses to account for expenses of €406 million related to a share buyback from the Government of the Islamic Republic of Iran. Petitioners assert ThyssenKrupp AG (TKAG) repurchased 16.9 million TKAG shares from the Islamic Republic of Iran at €24, a premium when the market price at the time was €8.92 per share. Petitioners maintain Mexinox's argument that the buyback was a capital transaction and should not result in the recognition of income or expense, is without merit.

Petitioners contend repurchasing shares at an above-market premium represents an additional expense and suggest this claim is supported by accounting rules. Petitioners assert that according to the Accountants' Handbook, equity transactions require allocation, noting that such transactions involve payment of an amount that must be allocated among assets acquired, liabilities settled, and expenses paid, because the prices paid for the individual assets, liabilities, and expenses are unstated. See Petitioner case brief at 3. Further, petitioners assert that the general principle is then applied to treasury stock repurchases. Petitioners maintain that TKAG repurchased shares from the Iranian holding company, IFIC Holding AG, in order to avoid serious damage to TKAG's business activities in the United States resulting from U.S. sanctions on firms with ties to Iran. This set of circumstances, petitioners argue, is different from the exception allowed in Financial Accounting Standards Board (FASB) Technical Bulletin No. 85-6 (FTB 85-6) for instances when a company seeks to buy a controlling interest. See Petitioner case brief at 5. Petitioners state the FASB's Financial Accounting Standards (FAS) No. 123 also holds that paying an above-market premium for share repurchases presents a cost or expense to the company.

Petitioners assert TKAG's decision to book the repurchase solely as a capital transaction, even if acceptable for accounting purposes, is not dispositive for antidumping purposes. Petitioners cite Silicomanganese from India: Notice of Final Determination of Sales at Less Than Fair Value and Final Negative Critical Circumstances Determination, 67 FR 15531 (April 2, 2002) and the accompanying Issues and Decision Memorandum at comment 14, to support their claim that the Department has the discretion and authority to reclassify expenses regardless of how they were recorded.

Petitioners maintain the premium paid in connection with the share buyback constitutes an expense that results from, and bears a direct relationship to sales to the United States. Petitioners argue the buyback resulted from U.S. sales by TKAG's affiliates (TKNNA, TKVDM USA, AST USA, and Mexinox USA); had TKAG not been doing business in the United States through its affiliates, the U.S. sanctions would not have applied as a result. Petitioners insist the buyback is an expense directly related to economic activity in the United States in that it reduced the Iranian Government's ownership interests in Mexinox USA and other American subsidiaries.

Alternatively, petitioners argue that at the very least, the Department should consider whether the premium should be treated as an indirect selling expense. Petitioners maintain that any claim that the buyback was unrelated to economic activity in the United States because it was incurred in Germany would be contrary to the regulatory mandate to adjust U.S. prices for selling expenses no matter where or when paid. See Petitioners case brief at 9.

Finally, petitioners state that any argument suggesting that the premium paid by TKAG in order to repurchase its shares from the Government of Iran be deemed extraordinary should be disregarded as such exceptions are generally limited to expenses arising from unusual,

unanticipated and unavoidable events. See Petitioners case brief at 10. Petitioners assert the premium expense incurred was not inevitable, as TKAG did have other options that it elected not to pursue. Id.

Mexinox counters petitioners' assertion by stating that there is no link between TKAG's share repurchase and Mexinox's U.S. sales of subject merchandise during the POR. Mexinox contends there is documentation related to the share repurchase which demonstrates that its purpose related specifically and solely to restrictions imposed on certain Department of Defense procurement contracts under 10 U.S.C § 2327.
Mexinox argues TKAG's decision to repurchase the shares has no relationship to sales of subject stainless steel products.

Mexinox states its independent auditors, KPMG, reviewed the May 2003 share repurchase during their audit of TKAG's 2002/2003 financial statements. KPMG, Mexinox contends, specifically considered the applicability of FTB 85-6 to the share repurchase. Mexinox asserts the portion of FTB 85-6 entitled "Accounting for a Purchase of Treasury Shares at a Price Significantly in Excess of the Current Market Price of the Shares...," provides that unless other consideration is received from the stockholder, an enterprise's transactions in shares of its own stock are solely capital transactions and should not result in the recognition of income or expense by the enterprise.

Mexinox states KPMG examined the facts surrounding the share repurchase and concluded that under FTB 85-6 the entire amount of the cost of the repurchased shares was properly accounted for as a reduction of shareholders' equity. Mexinox cites to TKAG's Third Quarter FY 2003 Interim Report and TKAG's FY 2003 Financial Report. See Mexinox's rebuttal brief at 9. Mexinox asserts the Department routinely defers to the findings of independent auditors under GAAP where there is no record evidence to contradict their findings. Moreover, Mexinox argues the Department's established practice with respect to share repurchases is consistent with KPMG's assessment of the proper treatment of this transaction under GAAP. See Stainless Steel Bar From Japan: Final Results of Antidumping Administrative Review, 65 FR 13717 (March 14, 2000) and the accompanying Issues and Decision Memorandum, and Certain Cold-Rolled Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Review, 63 FR 781 (January 7, 1998).

Mexinox argues the applicable accounting rules and principles support the independent auditors' treatment of the share repurchase as a capital transaction and not as an expense. Mexinox contends that FTB 85-6 states that "if no stated or unstated consideration in addition to the capital stock can be identified, the entire purchase price should be accounted for as the cost of treasury shares." See Mexinox's rebuttal brief at 12. Mexinox claims that with respect to the share repurchase transaction, in exchange for its payments TKAG received only its capital stock as consideration. Mexinox cites to FTB 85-6 paragraph 9, which states "most transactions by an enterprise in shares of its own stock are solely capital transactions, that is, the transaction involves only the transfer of ownership of the enterprise's stock or rights associated with ownership of the stock. Those transactions do not result in recognition of income or expense by the enterprise." See Mexinox rebuttal brief at 15. Mexinox emphasizes that unless other consideration is received from the selling stockholder, a corporation's acquisition of its own stock is solely a capital transaction that results in a direct reduction of shareholder equity, with an intermediate debit to an expense item on an income statement. According to Mexinox, the transaction itself has nothing to do with its operations and thus, should not be characterized or construed as generating an income statement expense. Mexinox insists it is a direct debit to shareholder equity because it is a pure capital transaction.

Second, Mexinox contends there is no basis in law or fact to treat the share repurchase as a

direct or indirect selling expense associated with U.S. sales of subject merchandise. Mexinox states arguments made in Silicomanganese from India regarding share repurchases were that such amounts should be included as part of financing or G&A expenses, not selling expenses. Mexinox argues section 351.410(c) of the Department's regulations defines direct selling expenses as expenses, such as commissions, credit expenses, guarantees and warranties, that result from, and bear a direct relationship to, the particular sale in question. See Mexinox rebuttal brief at 17. Mexinox states that pursuant to section 772(d)(1)(B) of the Tariff Act the requirements before an expense can be treated as a direct selling expense are: 1) it must be incurred by or for the account of the producer, exporter or affiliated importer; 2) it must have been incurred in selling the subject merchandise; and 3) it must result from, and bear a direct relationship to, the sale. See id. at 18. Mexinox asserts the share repurchase does not satisfy the requirements to classify it as an expense.

Mexinox believes TKAG's share repurchase was made solely and specifically in response to a Department of Defense procurement law prohibiting certain transactions with companies in which certain listed countries (including the Islamic Republic of Iran) have a significant interest. The purpose was to avoid TKAG being listed by the Secretary of Defense under that authority, thereby potentially adversely affecting those TKAG affiliates engaging in sales to Department of Defense agencies. Mexinox argues the law not only applies to certain procurement contracts with Department of Defense agencies, but also applies to such contracts regardless of where, or by whom, they are entered. The law does not apply generally to respondent's U.S. sales of subject merchandise, but does apply to TKAG affiliates worldwide that engage in the specified procurement contracts, including contracts outside of the United States. Mexinox makes similar arguments that there is no basis for treating the share repurchase as an indirect selling expense.

*Department's Position:* We determine, when a company acquires its own shares, those shares are considered treasury stock. Treasury stock is not classified as an asset in a company's balance sheet whereas gains or losses on sales of assets are recognized at the time such sales occur. As noted, however, treasury stock is not an asset. While the share buyback resulted in a reduction in stockholder's equity, there was no gain or loss to be accounted for from the sale of any asset. Nor did the resulting change in shareholder equity have any bearing on Mexinox's U.S. sales activity relating to subject merchandise.

We further note that a corporation does not realize a gain, nor incur a loss from stock transactions with its own stockholders. Treasury stock can either be retired or reissued. A company neither earns an income nor incurs an expense when it purchases or sells treasury stock. See Kieso, Donald, and Weygandt, Jerry, Intermediate Accounting, Ninth Edition, New York: John Wiley & Sons, Inc.,1998 at pages 771 - 774. As determined in Steel Sheet and Strip in Coils from Germany, which also addressed this specific issue related to ThyssenKrupp AG, "any costs associated with TKAG's reacquisition of its own equity do not qualify as expenses." See Steel Sheet and Strip in Coils from Germany at comment 1. Based upon the foregoing, there is no link between TKAG's repurchase of its shares and sale of subject merchandise that occurred in the United States. Finally, we disagree with the assertion that Mexinox was unresponsive on this issue and that Mexinox's unresponsiveness merits application of adverse facts available. Mexinox reported the approximate value of the U.S. sales by the TKAG group companies, and responded to each of our requests for additional information on this matter. Therefore, for these final results, we continue to treat TKAG' s share repurchase not as a selling expense, but as a reduction in stockholder's equity.

***Comment 16: Treatment of Non-Dumped Sales***

Mexinox states that in the Preliminary Results, the Department calculated the overall dumping margin by assigning a zero-percent dumping margin to U.S. sales made at or above home market prices. Mexinox argues the practice of weighted-average dumping margin constitutes a violation of the Department's obligations under U.S. law. Citing Federal Mogul Corp. v. United States, 63 F. 3d 1572, 1581 (Fed. Cir. 1995), Viraj Forgings Ltd. v. United States, 206 F. Supp. 2d 1288, 1296 n. 14 (CIT 2002), and Fundicao Tupy S.A. v. United States, 652 F. Supp. 1538, 1543 (CIT 1987), Mexinox states it is a well-established principle of U.S. law that the Department must interpret and apply the U.S. dumping laws in a way that does not conflict with international obligations, including obligations under the WTO Antidumping Agreement. Mexinox asserts this principle is rooted in Alexander Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118 (1804) (Charming Betsy), in which the Supreme Court declared that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." Mexinox maintains the doctrine set forth in Charming Betsy is still in effect today.

Citing, inter alia, Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. United States 926 F.Supp. 1138 (CIT 1987), Corus Engineering Steels Ltd. v. United States, Slip Op. 03-110 (CIT 2003) (Corus) and PAM, S.p.A. v. U.S. Department of Commerce, Slip Op. 03-48 (CIT May 8, 2003) (PAM), Mexinox asserts the Court, even though it upheld the Department's treatment of non-dumped sales, found "the statute neither requires nor prohibits {the Department} from considering non-dumped sales." See Mexinox case brief at 47, quoting Corus at 13-14 (Mexinox emphasis deleted). Mexinox contends the Department adopted and applied its weighted-average dumping margin practice solely as a matter of interpretive gap-filling. Mexinox argues the Department is obligated to exercise its gap-filling authority so as to reach a result that is consistent with international law.

Mexinox maintains the Department's interpretation of the statute, to the extent it is reasonable, is generally given deference under Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) (Chevron). However, Mexinox argues, when the Department's interpretation is inconsistent with U.S. international obligations, such deference is inappropriate. Mexinox avers that Hyundai Electronics Co., Ltd. v. United States, 53 F. Supp. 2d 1334 (CIT 1999) (Hyundai Electronics) is instructive on this point. In Hyundai Electronics, Mexinox notes, the Court contemplated a revocation standard promulgated by the Department that recently had been rejected by a WTO panel. While the Court eventually found it was possible to reconcile the Department's revocation standard with the WTO Antidumping Agreement, Mexinox states, the Court stressed that Chevron and the Charming Betsy doctrine must be applied together when the latter is implicated. See Mexinox case brief at 49, citing Hyundai Electronics at 1344.

Mexinox asserts the same analysis must be applied in this case. Since the statute is silent with respect to the treatment of non-dumped sales and the Department has adopted this practice as an interpretation of the statute, Mexinox claims the relevant question is whether the Department's interpretation is compatible with the WTO Antidumping Agreement. Mexinox contends the WTO Appellate Body's decision in European Communities-Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/AB/R (March 1, 2001) (Bed Linen from India) and more recently in United States Final Dumping Determination on Softwood Lumber from Canada, WT/DS264/AB/R (August 11, 2004) (Softwood Lumber from Canada) establishes that the use of weighted-average dumping margin is not compatible with the Antidumping Agreement. Mexinox states that in Bed Linen from India, the WTO Appellate Body upheld a WTO Panel finding that the European Communities (EC) had violated Article 2.4.2 of the Antidumping Agreement by treating non-dumped sales as negative price differences when computing the aggregate dumping margin. According to Mexinox, in that case the WTO Panel noted the Antidumping Agreement refers to dumping margins only in the

context of the whole product. Mexinox contends "since the EC defined the product as 'certain bed linens from India,' it was bound to calculate an aggregate dumping margin on the basis of that whole product group, not just the sub-group of sales that generated a positive dumping margin." Mexinox case brief at 50. Mexinox states the WTO Panel and Appellate Bodies also determined the EC's approach prevented a fair comparison of the export price and NV, because the WTO found that by treating non-dumped sales as negative margins, "the EC had effectively manipulated the prices of the subject products to produce a higher dumping margin than they actually generated." Id.

Mexinox argues it is irrelevant that the United States was not the appellee in Bed Linen from India. Furthermore, Mexinox asserts, it is also irrelevant that Bed Linen from India entailed an investigation rather than an administrative review because the terms of Article 2 of the Antidumping Agreement are made applicable to the determination of assessment amounts in the context of administrative reviews by virtue of Article 9.3 of the Antidumping Agreement.

Mexinox asserts Bed Linen from India establishes the practice of weighted-average dumping as fundamentally inconsistent with the binding terms of the WTO Antidumping Agreement. It submits the decision by the Appellate Body in Softwood Lumber from Canada upheld the Panel's determination that the Department's practice of weight-averaging the aggregation of dumping margins to determine overall margins of dumping violates Article 2.4.2 of the Antidumping Agreement. Moreover, Mexinox argues the Appellate Body noted the Antidumping Agreement in Articles 2.2.1 and 9.4 sets forth circumstances where certain sales may be disregarded. Respondent claims Article 2.4.2 contains no such express language permitting an investigating authority to disregard sales at or above normal value; therefore the statute does not permit the treatment of non-dumped sales.

Since U.S. antidumping laws do not require weight-averaging of dumping margins, Mexinox argues, there is no direct conflict between U.S. law and international law. Further, Mexinox asserts, under the Charming Betsy doctrine the U.S. antidumping statute must be interpreted in a way that is compatible with the WTO Antidumping Agreement. Therefore, Mexinox submits, any interpretation of U.S. antidumping law that permits non-dumped sales in the calculation of the aggregate dumping margin is prohibited as a matter of U.S. law under Charming Betsy.

Petitioners respond that in each instance in which the issue of non-dumped sales has been raised, the Department has correctly dismissed this argument and maintained its current practice. Petitioners contend Mexinox incorrectly argues the Appellate Body's decision in Softwood Lumber from Canada.

First, petitioners assert Softwood Lumber from Canada is limited to the Department's treatment of non-dumped sales as applied to the specific and unique facts of the Softwood Lumber from Canada antidumping investigation, rather than a ruling of the WTO on the validity of U.S. treatment of non-dumped sales as such. They argue the Department chose to establish product sub-groups of identical or very similar product types because the Softwood Lumber from Canada investigation covered such a broad category of products. Petitioners describe how the Department, for that case, calculated weighted-average margins at the product type level, and then aggregated these to calculate weighted-average margins at the sub-group level. See Petitioners rebuttal brief at 20. Petitioners continue by stating the overall weighted-average margin was calculated by aggregating the positive sub-group margins (while ignoring the negatives) and dividing by the value of all U.S. sales (including those for which no dumping was found). Petitioners claim in Softwood Lumber from Canada, the Department employed a methodology that weight-averaging negative margins at two different levels of the analysis, thereby effectively compounding the effects of non-dumped sales. Petitioners cite a passage of the decision to emphasize the Appellate Body made clear at the outset that its ruling was

confined to the particular facts of Softwood Lumber from Canada. See Petitioners rebuttal brief at 20.

Petitioners maintain Softwood Lumber from Canada has no relevance to the treatment of non-dumped sales in the context of administrative review proceedings. They add that it is in administrative reviews that the Department calculates dumping margins on an entry-by-entry basis, for duty assessment purposes. Id. at 21. Petitioners assert the U.S. Court of Appeals recently stated in Timken Co. v. United States, 354 F.3d 1334, 1342-43 (Fed. Cir. 2004), the Department's practice of weight-averaging negative dumping margins comports with this approach by allowing Commerce to fully neutralize dumped sales without having an effect on fair-value sales. Petitioners also cite as examples Serampore Industries PVT Ltd. v. United States, 675 F. Supp. 1353 (CIT 1987) and Böwe Passat Reinigungs-Und Wäschereitechnik GmbH v. United States.

Petitioners assert the Court held that the Department reasonably interpreted section 771(35)(A) of the Tariff Act, which defines dumping margin as the amount by which the normal value exceeds the EP or CEP of the subject merchandise, thus allowing for non-dumped sales. See Petitioners rebuttal brief at 21. Petitioners state that in the final analysis, the Department's responsibility is to interpret the U.S. antidumping statute, which necessarily often means filling gaps that Congress has either deliberately or inadvertently left in the statutory regime. Petitioners cite Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983) to contend the Court has recognized that in light of the antidumping law's inherent complexity, the agency's attempts to interpret and apply the statute are entitled to special deference. Petitioners argue it is not the responsibility of the Department to interpret and apply the WTO agreements or decisions of its dispute settlement bodies, as Mexinox is suggesting. Petitioners argue 19 U.S.C. section 3533 addresses the procedures governing U.S. recognition of WTO dispute settlement decisions. Specifically, they assert, 19 U.S.C. section 3533(g) provides that in any case in which a dispute settlement panel or the Appellate Body finds in its report that a regulation or practice of a department or agency of the United States is inconsistent with any of the Uruguay Round Agreements, that regulation or practice may not be amended, rescinded, or otherwise modified in the implementation of such report unless and until there have been consultations between appropriate congressional committees, the agency involved, the U.S. Trade Representative, and an opportunity for public comment. Id. Petitioners aver this practice recognizes that WTO rulings do not have the status of supreme law in the United States, and will be adopted only after careful and deliberate evaluation by Congress and the affected agency.

Petitioners conclude by asserting the Bed Linens from India and Softwood Lumber from Canada decisions do not indicate that the Department's general policy of weight-averaging negative margins, in the context of administrative review proceedings, is contrary to international law. Petitioners add that, in any event, the Department would not be permitted to change its treatment of non-dumped sales without invoking the procedures required by 19 U.S.C. section 3533.

*Department Position:* We continue to uphold our calculations of the weighted-average dumping margin as suggested by the respondent for these final results. As stated in Sheet and Strip in Coils from Germany, the Court has upheld the Department's treatment of non-dumped sales in Corus, PAM, and The Timken Company v. United States, 240 F. Supp. 2d 1228 (CIT 2002), and our methodology is consistent with our statutory obligations under the Tariff Act.

Furthermore, the Federal Circuit recently affirmed the Department's methodology. The Timken Company v. United States, No. 03-1098, 03-1238, 2004 U.S. App. LEXIS 627 (Fed. Cir.

2004). As discussed below, we include U.S. sales that were not priced below normal value (NV) in the calculation of the weighted-average dumping margin as sales with no dumping margin. The value of such sales is included in the denominator of the weighted-average margin along with the value of dumped sales. We do not, however, allow U.S. sales that were not priced below NV to offset dumping margins found on other sales.

Section 771(35)(A) of the Tariff Act defines dumping margin as "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Section 771(35)(B) defines weighted-average dumping margin as "the percentage determined by dividing the aggregate dumping margins determined for a specific exporter or producer by the aggregate export prices and constructed export prices of such exporter or producer." The Department applies these sections by aggregating all individual dumping margins, each of which is determined by the amount by which NV value exceeds EP or CEP, and dividing this amount by the value of all sales. The use of the term aggregate dumping margins in section 771(35)(B) is consistent with the Department's interpretation of the singular dumping margin in section 771(35)(A) as applying on a comparison-specific level and not on an aggregate basis. At no stage of the process is the amount by which EP or CEP exceeds the NV on sales that did not fall below NV permitted to cancel out the dumping margins found on other sales.

This does not mean, however, that non-dumped sales are ignored in calculating the weighted-average dumping margin. It is important to note that the weighted-average margin will reflect any non-dumped merchandise examined during the POR: the value of such sales is included in the denominator of the weighted-average dumping margin, while no dumping amount for non-dumped merchandise is included in the numerator. Thus, a greater amount of non-dumped merchandise results in a lower weighted-average margin.

Furthermore, this is a reasonable means of establishing estimated duty-deposit rates in investigations and assessing duties in reviews. The deposit rate we calculate for future entries must reflect the fact that Customs is not in a position to know which entries of subject merchandise are dumped and which are not. By spreading the liability for dumped sales across all reviewed sales, the weighted-average dumping margin allows Customs to apply this rate to all merchandise subject to review.

Finally, with respect to respondent's WTO-specific arguments, we note U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations. As stated in Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada with respect to implementing the URAA in the case of Softwood Lumber from Canada, Congress made clear that reports issued by WTO panels or the Appellate Body "will not have any power to change U.S. law or order such a change." SAA at 660. See Final Results of Antidumping Duty Administrative Review: Carbon and Certain Alloy Steel Wire Rod from Canada, 69 FR 68309 (November 24, 2004) and accompanying Issues and Decision Memorandum at comment 8 (Wire Rod from Canada). The SAA emphasizes that "panel reports do not provide legal authority for federal agencies to change their regulations or procedures . . . ." Id. To the contrary, Congress has adopted an explicit statutory scheme for addressing the implementation of WTO dispute settlement reports. See 19 U.S.C. § 3538. As is clear from the discretionary nature of that scheme, Congress did not intend for WTO dispute settlement reports to automatically trump the exercise of the Department's discretion in applying the statute. See 19 U.S.C. § 3538(b)(4) (implementation of WTO reports is discretionary); see also, SAA at 354 ("After considering the views of the Committees and the agencies, the Trade Representative may require the agencies to make a new determination that is 'not inconsistent' with the panel or Appellate Body recommendations..." (Emphasis added)). See Wire Rod from Canada.

***Comment 17: Circumstances of Sale Adjustment***

Mexinox states that in accordance with section 773(a)(7)(B) of the Tariff Act, the Department granted a CEP offset to normal value (NV) in the preliminary results. However, Mexinox states that the Department limited the amount of the CEP offset to the amount of ISEs and inventory carrying costs (ICCs) deducted from CEP. Although the CEP offset cap is permitted by the statute, Mexinox contends, it precludes the Department from making a fair comparison between U.S. price and NV. Mexinox asserts both U.S. and international law require a fair comparison between U.S. price and NV, citing Smith-Corona Group v. United States, 713 F.2d 1568, 1578 (Fed. Cir. 1983), cert.denied, 465 U.S. 1022 (1984); Consumer Prod. Div., SCM Corp. v. Silver
Reed America, Inc., 753 F.2d 1033, 1039-40 (Fed. Cir. 1985); and the World Trade Organization (WTO) Antidumping Agreement at Article 2.4. Therefore, Mexinox argues, the Department can still account for the differences affecting price comparability by making an additional adjustment for ISEs and ICCs beyond the amount of the CEP offset. Mexinox claims such a circumstances of sale adjustment is lawful under section
773(a)(6)(B)(iii) of the Tariff Act, and requests that the Department make this necessary and appropriate adjustment for these final results. Mexinox holds that Article 2.4 of the WTO Antidumping Agreement mandates that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability" (emphasis added by respondent). Regarding CEP sales, Mexinox notes, Article 2.4 specifically provides that if "price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph." Mexinox maintains the WTO Antidumping Agreement does not put a cap on the amount of the adjustments that must be made to NV to make it comparable to CEP. Thus, Mexinox contends the Antidumping Agreement establishes that the Department must adjust for all LOT-related differences between home market and U.S. market
sales that affect comparability.

While the CEP offset cap appears to prevent the Department from making a fair comparison, Mexinox argues, the Department can adhere to the Antidumping Agreement and simultaneously conduct a fair comparison under U.S. law by allowing an additional adjustment for all ISEs and ICCs above the CEP offset cap. Mexinox states that pursuant to section 773(a)(6)(B)(iii) of the Tariff Act, NV "shall be . . . increased or decreased by the amount of any difference (or lack thereof) between export price or constructed export price and {NV} (other than a difference for which allowance is otherwise provided under this section) that is established to the satisfaction of the administering authority to be
wholly or partly due to . . . differences in the circumstances of sale." Mexinox asserts this approach is upheld by the Department's practice and Court of International Trade (CIT) case law. Mexinox cites The Budd Co.,Wheel & Brake Div. v. United States, 14 CIT 595, 746 F. Supp. 1093, 1100 (1990) (Budd Co.), in which the Department granted a circumstances of sale adjustment to NV to account for distortions caused by hyperinflation in the Brazilian economy between the date of sale and date of shipment.
According to Mexinox, the petitioners in that case argued the Department had subverted the applicable currency conversion regulations. Upon appeal, Mexinox contends, the CIT not only sustained the Department's use of the circumstances of sale adjustment as a valid display of discretion, but also stated that "... to the extent the circumstance of sale adjustment conflicted with the currency conversion regulations, it was appropriate
for Commerce to choose to effectuate the primary statutory purpose in favor of fair determinations based on contemporaneous comparisons." See Mexinox case brief at 43, citing

Budd Co. at 1100. Although this decision was handed down prior to implementation of the Uruguay Round Agreements Act (URAA), Mexinox notes, the continuity in the statute regarding circumstances of sale adjustments renders it applicable to the instant review. Mexinox also cites Viraj Group, Ltd. v. United States, Slip Op. 01-104 (CIT 2001), in which the CIT referred to Budd Co. as an example of the discretion available to the Department. According to Mexinox, the CIT remanded this case to the Department because its mechanical application of the exchange rate methodology was contrary to the goal of the antidumping laws to calculate as accurate a margin as possible. Mexinox holds these cases clearly show that, even under U.S. law, "it is the Department's first and most important obligation to establish comparability between the U.S. price and NV." See Respondent case brief at 43, citing Budd Co. at 1101, Mexinox claims that the Department argued it was not required to limit circumstances of sale adjustments to direct expenses, stating "...we are not precluded from using this provision to achieve a result that reflects economic reality and is consistent with the basis purpose of the Act. . . .to fairly compare foreign market value and United States price on an equivalent basis." See Respondent case brief at 44.

Petitioners contend no circumstances of sale adjustment is warranted for alleged differences in indirect selling expenses and ask the Department to once again reject Mexinox's request as it has done in past reviews. Petitioners argue that Mexinox has misinterpreted the cap on the CEP offset and cite section 773(a)(7)(B) of the Tariff Act which states: "When normal value is established as a level of trade which constitutes a more advanced stage of distribution than the level of trade of the constructed export price, but the data available do not provide an appropriate basis to determine under subparagraph (A)(ii) a level of trade adjustment, normal value shall be reduced by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D)." See Petitioners rebuttal brief at 17, citing 773(2)(7)(B) of the Tariff Act. Petitioners argue that this law in its mandating a cap on the deduction of home-market selling expenses cannot be ignored.

In addition, Petitioners claim the Department has a practice of considering circumstances of sale adjustments related only to direct selling expenses. Petitioners cite 19 CFR section 351.410(b) : "The Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses." Petitioners claim they have already demonstrated that Mexinox's alleged differences in selling expenses between the two markets are simply artifices designed to manipulate the margin analysis and propose that the Department reject Mexinox's request for a circumstance of sale adjustment and recalculate the reported expense ratio to be the same for all markets.

*Department's Position*: We disagree. We note at the outset that U.S. law, as implemented through the URAA, is fully consistent with our WTO obligations. See SAA at 669. Our exclusive focus in regard to the claimed adjustment is on the requirements of U.S. law, not those of the WTO Agreement.

Section 773(a)(7)(B) of the Act establishes that, in making the CEP offset adjustment, the Department will reduce NV "by the amount of indirect selling expenses incurred in the country in which normal value is determined on sales of the foreign like product but not more than the amount of such expenses for which a deduction is made under section 772(d)(1)(D)." See also section 351.412(f)(2) of the Department's regulations. This represents a specific statutory and regulatory limitation on the Department's authority to make adjustments for differences in indirect selling expenses, a limitation that is not overridden by the general authority in section 773(a)(6)(C)(iii) of the Act to make adjustments for differences in circumstances of sale.

The Department's regulations at section 351.410(b) support our conclusion that section 773(a)(6)(C)(iii) of the Act cannot be used to circumvent the specific statutory and regulatory limitation with respect to adjustments for differences in indirect selling expenses. Section 351.410(b) indicates that adjustments for differences in circumstances of sale under section 773(a)(6)(C)(iii) will not be made for anything other than direct selling expenses, assumed expenses, and certain commissions. Specifically, section 351.410(b) of the regulations states that, "with the exception of the allowance described in paragraph (e) of this section concerning commissions paid only in one market, the Secretary will make circumstances of sale adjustments under section 773(a)(6)(C)(iii) of the Act only for direct selling expenses and assumed expenses."

As defined in section 351.410(c) of the Department's regulations, direct selling expenses consist of expenses "such as commissions, credit expenses, guarantees, and warranties, that result from, and bear a direct relationship to, the particular sale in question." Section 351.410(d), in turn, defines assumed expenses as "selling expenses that are assumed by the seller on behalf of the buyer, such as advertising expenses." The Department treats all other selling expenses as indirect expenses unless the respondent establishes that the expense in question is direct in nature. See, e.g., RHP Bearings v. United States, 875 F. Supp. 854, 859 (CIT 1995). ISEs and ICCs are, by their very nature, indirect expenses; they are incurred regardless of whether a sale is made.

Therefore, we have not made an additional circumstance of sale adjustment to NV for these final results to account for indirect expenses beyond the amount of the CEP offset cap.

**Recommendation**

Based on our analysis of the comments received, we recommend adopting all of the above positions and adjusting the margin calculation accordingly. If these recommendations are accepted, we will publish the final results of the review and the final weighted-average dumping margin for Mexinox in the Federal Register.

AGREE _____ DISAGREE _____

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date